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No. 85-795

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD D. BENNETT and CAROLE A. BENNETT,

Petitioners,

—v.—

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a civil claim under the Racketeer Influenced and Corrupt Organizations Act was properly dismissed when the complaint fails to allege the existence of any "enterprise" for purposes of 18 U.S.C. § 1962(c) other than the corporation which is the sole defendant in the action.

2. Whether, in an action against a bank under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder to recover investment losses on securities purchased with the proceeds of loans made by the bank, the causation and "in connection with" requirements of the statute and rule are satisfied when the only alleged misrepresentation by the bank was that Federal Reserve Regulation U was not applicable to such loans.

3. Whether Congress intended to create a private right of action for violation of the Federal Reserve margin regulations promulgated pursuant to Section 7 of the Securities Exchange Act of 1934.

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Rule 28.1 of the Rules of the Supreme Court of the United States 1

No. 85-795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD D. BENNETT and CAROLE A. BENNETT,

Petitioners,

—v.—

UNITED STATES TRUST COMPANY OF NEW YORK,[1]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

1 Listing pursuant to Rule 28.1 of the Rules of this Court: U.S. Trust Corporation, a New York corporation, is the parent company of Respondent United States Trust Company of New York; Foreign & Colonial Asset Management (London) is a 50%-owned indirect subsidiary of Respondent; Financial Technologies International, Inc. (N.Y.) is a 94%-owned direct subsidiary of U.S. Trust Corporation, and Saudi-U.S. Trust Company, Ltd. (Bahamas) is a 50%-owned indirect subsidiary of U.S. Trust Corporation. Neither Respondent nor U.S. Trust Corporation has any other subsidiaries or affiliates except wholly-owned subsidiaries.

STATEMENT OF THE CASE

Over a period of years, Petitioners (the "Bennetts") sought and obtained from Respondent ("U.S. Trust") a series of loans for the purpose of investing in securities. Due to a subsequent decline in dividend yields and stock market prices, the Bennetts ultimately suffered losses on those investments. Alleging eight separate causes of action under New York and federal law, the Bennetts sued U.S. Trust in the United States District Court for the Southern District of New York to recover the amount of those losses, on the grounds that U.S. Trust had extended credit in excess of the limits permitted banks by the Federal Reserve margin regulations and that the Bennetts would not have incurred their investment losses and interest expense but for the "excessive" loans obtained from U.S. Trust.[2] The Bennetts also claimed that U.S. Trust had falsely represented to them that such margin requirements were inapplicable to their loans and had failed to disclose that the extensions of credit violated those requirements. No other claims of fraud or breach of duty were asserted against U.S. Trust, but the complaint also included allegations under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1961 *et seq.*), with securities fraud and mail fraud as the predicate offenses.

U.S. Trust moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state any claim upon which relief can be granted. The District Court granted the motion and the complaint was dismissed. The claims based upon U.S. Trust's alleged violation of the margin regulations were dismissed on the ground that no private right of action exists under Section 7 of the Securities Exchange Act of 1934 (15 U.S.C. § 78(g)). (Pet. App. A-17) All of the remaining claims were dismissed for lack of the requisite causal relationship between U.S. Trust's alleged conduct and the Bennetts' losses. (Pet. App. A-17—A-18) Having found that lack of causation

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2 The complaint is reproduced in full in the Appendix to this brief.

was a fatal defect common to all of the various fraud claims, the District Court did not reach the question of whether the Bennetts had stated any claim under RICO. (Pet. App. A-18).

On appeal by the Bennetts, the Court of Appeals unanimously affirmed the decision of the District Court. The Court of Appeals substantially followed the reasoning of the District Court but also held that the RICO claims were properly dismissed since a corporate entity may not simultaneously be the "enterprise" and the "person" who conducts the affairs of the enterprise through a pattern of racketeering activity for purposes of 18 U.S.C. § 1962(c). (Pet. App. A-11—A-13)

SUMMARY OF ARGUMENT

The Bennetts' petition should be denied because the issues presented do not warrant further review by this Court and, in any event, the case was correctly decided by the courts below.

1. In holding that the same entity cannot simultaneously be both the "person" whose conduct is proscribed and the "enterprise" through which such person acts within the meaning of 18 U.S.C. § 1962(c), the Court of Appeals, unlike the District Court, reached an issue not necessary to the disposition of the case. But having done so, the Court of Appeals correctly interpreted the plain language and the legislative intent of the statute and followed the result reached in five other circuits in a nearly unanimous line of well-reasoned appellate cases.

2. In ruling that the Bennetts' claims under Section 10(b) of the Securities Exchange Act (15 U.S.C. § 78(j)(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5) were legally insufficient, the Second Circuit correctly followed its own decision in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 253 (1984), a case in which this Court has denied certiorari on this very issue. The case recently decided by the Third Circuit which the Bennetts assert is contrary, *Angelastro v. Prudential-Bache*

Securities, Inc., 764 F.2d 939 (3d Cir.), *cert. denied*, 54 U.S.L.W. 3271 (U.S. Oct. 22, 1985) (No. 85-421), is obviously distinguishable and therefore presents no conflict between circuits.

3. This Court's holdings in *Cort v. Ash*, 422 U.S. 66 (1975), and subsequent cases compel denial of an implied private right of action under Section 7 of the Securities Exchange Act and the Federal Reserve margin regulations thereunder. Indeed, the six courts of appeals that have now decided the question in the light of *Cort v. Ash* have uniformly held that there is no private right of action. No court of appeals has held to the contrary. Furthermore, this Court has twice declined to review the question.

ARGUMENT

I. The Bennetts' Claims under the Racketeer Influenced and Corrupt Organizations Act Were Correctly Held to be Fatally Defective.

The District Court was correct that the lack of legal causation between U.S. Trust's alleged conduct and the Bennetts' investment losses negates both securities fraud and mail fraud as RICO predicates and therefore, without more, requires dismissal of their RICO claims. As discussed more fully in Section II below, the Bennetts' securities fraud claims fail to satisfy the causation and "in connection with" requirements of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder. Consequently, their RICO claims based on such allegations of securities fraud necessarily also fail. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 18-19 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

For the same reason, the Bennetts did not set forth any claim of mail fraud that would be cognizable under 18 U.S.C. § 1341. *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970). In that case, the court held that fraud in the context of a commercial transaction is not indictable under

the mail fraud statute "when the customer gets exactly what he expected and at the price he expected to pay." *Id.* at 1180. By this analysis, the Bennetts' claims of underlying mail fraud are deficient because they fail to allege that U.S. Trust's misrepresentations pertained either to the nature of the bank-customer relationship between the parties or to the purchases of securities that allegedly resulted from U.S. Trust's extensions of credit. That is, the Bennetts got from U.S. Trust exactly what they bargained for: loans in given amounts at certain stated interest rates. There is no allegation that U.S. Trust misrepresented the terms or conditions of the loans, or otherwise expected to get "something for nothing," an essential element and indicator of fraud. Nor, as the complaint reveals and the Court of Appeals recognized (Pet. App. A-9—A-10), did U.S. Trust make any statement about the Bennetts' purchases of securities from which their losses directly resulted. Merely to allege that "[a]s a result of the transactions of which the untrue statements were a part, money and property changed hands," does not amount to fraud within the meaning of Section 1341. *Regent Office Supply Co.*, 421 F.2d at 1181.

Having decided, nevertheless, to reach the RICO question, the Court of Appeals, in line with the result reached in five other circuits, correctly held that U.S. Trust could not properly be cast simultaneously as both the "person" and the "enterprise" within the meaning of Section 1962(c) of RICO. (Pet. App. A-11—A-13) That Section provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

The issue here is not one of liberal versus narrow construction, as the Bennetts would have it. It is one of plain meaning versus tortured construction to reach a desired result. It would be illogical to read "person" and "enterprise" to mean the

same entity, when the two words are used in juxtaposition in the same sentence and when, in particular, the concept of an entity "employed by or associated with" itself makes no sense. The Bennetts did not allege an "enterprise" separate from U.S. Trust for the obvious reason that there is none in this case. They attempt to cure this deficiency by asking this Court to rewrite the statute.

Apart from plain meaning, the Second Circuit correctly recognized that (Pet. App. A-13) "requiring a distinction between the enterprise and the person comports with the legislative intent and policy. Such a distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity."

Moreover, the Second Circuit's ruling follows the nearly unanimous and persuasive appellate authority. *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 634 (3d Cir. 1984) ("We hold only that a violation of section 1962(c) by a corporate entity requires an association with an enterprise that is not the same corporation."); *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, ____ U.S. ____, 105 S. Ct. 3291 (1985) ("The use of the terms 'employed by' and 'associated with' appears to contemplate a person distinct from the enterprise. If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear."); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) ("If Union Bank is the enterprise, it cannot also be the RICO defendant . . . . Thus, Rae can state no RICO cause of action against Union Bank itself.") To the same effect are *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified on other grounds*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

Thus, six courts of appeals have now held that a corporate defendant in a RICO case cannot by itself satisfy the "enterprise" requirement of Section 1962(c). Only one court of appeals has had a contrary view. *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). The court in that case made the obvious point that a corporation comes within the definition of "person" and also comes within the definition of "enterprise" under Section 1961, but offers no real explanation as to how, under Section 1962(c), one entity can function both as the "enterprise" and as the "person" employed by or associated with the "enterprise" and who conducts such "enterprise's" affairs.

Because the Second Circuit correctly upheld the dismissal of the Bennetts' RICO claims in accordance with the clear terms of the statute, the legislative history and the overwhelming appellate authority, and because the issue did not have to be reached at all, further review by this Court is unnecessary.[3]

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3 In addition to its arguments that the Bennetts failed to allege any predicate offense under RICO and that there was an impermissible identity between "person" and "enterprise," U.S. Trust argued in the courts below that the RICO claims are fatally deficient on the additional grounds that (i) the Bennetts failed to allege a "pattern of racketeering activity" within the meaning of RICO because the separate acts alleged amount to no more than artificial subdivisions of a single episode of conduct, *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S. Ct. 3275, 3285, n.14 (1985); *see also United States v. Weisman*, 624 F.2d 1118, 1124, n.5 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *Computer Sciences Corp.*, 689 F.2d at 1189, and (ii) the Bennetts did not allege any organized criminal activity connected with the case. *See Mon-Shore Management, Inc. v. Family Media, Inc.*, No. 83-2013, slip op. (S.D.N.Y. March 29, 1984) (available on Lexis, Genfed Library, Dist. file); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28, n.3 (2d Cir. 1983); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 558 F. Supp. 1348 (S.D.N.Y. 1983); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975); *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt International Resources Corp.*, 526 F. Supp. 736, 746 (N.D. Ill. 1981).

II. The Bennetts' Claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5 Thereunder Were Properly Dismissed.

The Second Circuit affirmed the District Court's dismissal of the Bennetts' Section 10(b) and Rule 10b-5 claims because U.S. Trust's alleged misrepresentation did not directly or proximately cause the Bennetts' loss. (Pet. App. A-9—A-10) The Bennetts' allegations established, at most, transaction causation, but failed to establish the necessary loss causation. *Ibid.*

The ruling of the Court of Appeals is squarely in accord with *Chemical Bank*, 726 F.2d 930, the controlling case in the Second Circuit, and with other decisions of that court similarly establishing the requirement of loss causation under Section 10(b) and Rule 10b-5. This Court has denied certiorari in three of those cases on this very issue. *Chemical Bank*, 726 F.2d 930; *Marbury Management, Inc. v. Kohn*, 629 F.2d 705 (2d Cir.), *cert. denied*, 449 U.S. 1011 (1980); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). The case at bar was correctly decided and raises nothing new on this point.

The case recently decided by the Third Circuit on which the Bennetts rely so heavily, *Angelastro*, 764 F.2d 939 (Pet. at 8-9), is obviously distinguishable and thus presents no conflict between circuits. In *Angelastro*, a broker misrepresented and concealed the credit terms, such as the applicable rates of interest, on plaintiff's margin account, thereby inducing her to purchase securities through the broker on margin. This was held to affect her "course of dealing in securities" and thus to fall within the scope of Section 10(b) and Rule 10b-5. 764 F.2d at 943.

The instant case is very different, as the complaint reveals and the Court of Appeals was careful to note. It was the Bennetts' idea to borrow money in order to purchase public utility stocks. (Pet. App. A-9) There were no allegations that U.S. Trust recommended the purchase of such stock in general,

or of any public utility stocks in particular. U.S. Trust played no role whatsoever in determining or influencing what securities the Bennetts bought, retained or sold. *Ibid.* Nor did the Bennetts allege that U.S. Trust had misrepresented in any way any of the terms or the risks of the loans. Rather, the Bennetts knew how much they were borrowing, for what purpose, on what terms and at what risk. All the Bennetts claim is that if Federal Reserve Regulation U (12 C.F.R. § 221.1(a)(1)) had been applied to their account, they would have had less money to invest. Their loss, however, as the Court of Appeals stated, "was caused by the Bennetts' own unwise investment decisions, not by U.S. Trust's misrepresentation." (Pet. App. A-10)

Thus, contrary to the Bennetts' characterization (Pet. at 8), the Court of Appeals did not hold that Section 10(b) requires that the misrepresentation relate directly to the investment value of the securities. Indeed, in distinguishing its own decision in *Marbury Management*, the Court expressly said so. (Pet. App. A-10) The point is that there must be a proximate causal link between the misrepresentation and the loss. The mere existence of underlying securities transactions does not give rise to a Section 10(b) claim. *Chemical Bank*, 726 F.2d at 943.

There being no error below and no circuit conflict, certiorari should not be granted on this issue.

III. No Implied Private Right of Action Exists under Section 7 of the Securities Exchange Act or the Margin Regulations Thereunder.

Applying the well-settled principles set forth by this Court in *Cort v. Ash*, 422 U.S. 66, and subsequent cases and following an unbroken line of cases decided by five other federal appellate courts, the Second Circuit correctly held that Congress did not intend to create a private right of action under Section 7 of the Securities Exchange Act or the Federal Reserve margin regulations thereunder.

Six courts of appeals have now considered the issue, and all have ruled that investors, including so-called innocent, good faith investors, have no implied private right of action under the margin regulations. *Bassler v. Central National Bank in Chicago*, 715 F.2d 308 (7th Cir. 1983); *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983); *Gilman v. Federal Deposit Insurance Corp.*, 660 F.2d 688 (6th Cir. 1981); *Gutter v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 1194 (6th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); *Stern v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 603 F.2d 1073 (4th Cir. 1979); *Utah State University of Agriculture and Applied Science v. Bear, Stearns & Co.*, 549 F.2d 164 (10th Cir.), *cert. denied*, 434 U.S. 890 (1977). This Court has denied certiorari on the question in two of those cases. *Gutter*, 644 F.2d 1194; *Utah State University*, 549 F.2d 164.

Neither Section 7 of the Act (Pet. App. A-20—A-24) nor Regulation U thereunder (Pet. App. A-25) expressly provides a right of action for private litigants. Therefore, the question is whether a private right of action should be implied by the courts. That question must be determined in accordance with the four relevant factors set forth in *Cort v. Ash*, 422 U.S. at 78: (i) whether the plaintiff is within the class for whose "especial" benefit the statute was enacted, (ii) whether there is any indication of a legislative intent to create or deny such a remedy, (iii) whether the implication of a private remedy is consistent with the underlying purposes of the legislative scheme and (iv) whether the cause of action is one traditionally relegated to state law.

As subsequent decisions of this Court make clear, and as the Court of Appeals held (Pet. App. A-5), the central inquiry in applying the *Cort v. Ash* criteria is whether Congress intended to create a private right of action. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

First, as the courts of appeals have uniformly found, there is no evidence, either in Section 7 or in its legislative history, that Congress had such an intention. The Court of Appeals in the present case correctly stated that "[t]he absence of any indication of legislative intent to create a private cause of action under section 7 strongly suggests that Congress did not intend to create one." (Pet. App. A-6, quoting five earlier appellate decisions to the same effect.)

Although investors may indirectly be protected by operation of the margin regulations, Section 7 was certainly not enacted for their "especial" benefit. There is no doubt that the primary purpose of Section 7 was to regulate credit in the securities markets. And the 1970 amendment to Section 7 as well as the adoption of Regulation X thereunder (12 C.F.R. Part 224) makes crystal clear that investors are not the intended special beneficiaries of the statute. *E.g., Bassler*, 715 F.2d at 311. By reason of this amendment, Section 7 for the first time prohibited individual investors from obtaining, receiving or enjoying credit that is proscribed by the margin regulations. As the courts have noted, the fact that the Federal Reserve in Regulation X chose to exempt good faith, innocent borrowers from violations of law has no bearing on the fact that Congress did not choose to provide such investors with a private right of action against lenders. *Ibid*; Pet. App. A-8.

The Bennetts' argument that private actions are required to deter margin violations is no more persuasive than the deterrence argument in *Cort v. Ash*. There, this Court found that the remedy of a private action for damages would not aid the primary congressional goal. This Court's statement regarding the federal election statute at issue there is equally applicable to the Federal Reserve margin regulations:

> Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to "borrow" corporate funds for

> a time; the later compelled repayment might well not deter the initial violation, and would certainly not decrease the impact of the use of such funds upon an election already past.

Cort v. Ash, 422 U.S. at 84.

Finally, the Court of Appeals in the instant case correctly pointed out (Pet. App. A-7) that allowing a private cause of action under Section 7 would not be consistent with the "underlying purposes of the legislative scheme" since it could encourage violations by investors seeking to shift the risk of loss.

The Second Circuit properly affirmed the denial of an implied private right of action under the margin regulations. This Court has previously declined to consider the issue and there is no reason to consider it now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD CEDARBAUM
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December 2, 1985

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 3038 (KTD)

RICHARD D. BENNETT and CAROLE A. BENNETT,

Plaintiffs,

—against—

UNITED STATES TRUST COMPANY OF NEW YORK,

Defendant.

COMPLAINT

PLAINTIFFS DEMAND TRIAL BY JURY

Plaintiffs, by their attorneys Spengler Carlson Gubar Brodsky & Frischling, for their Complaint, allege:

JURISDICTION AND VENUE

1. This action arises under Section 7 of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78g], and rules and regulations promulgated thereunder (together, the "Margin Rules"), under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, under 18 U.S.C. §§ 1961-68 ("RICO"), under N.Y. General Business Law §§ 352-359-g (the "Martin Act"), and under the common law.

2. Plaintiffs are citizens of New Jersey. Defendant is a citizen of and has its principal place of business in New York.

3. In all of the transactions which are the subject of this suit the plaintiff Richard D. Bennett acted as the agent for his

wife, the plaintiff Carole A. Bennett. All of the plaintiff Richard D. Bennett's conversations and communications with the defendant were on behalf of himself and the plaintiff Carole A. Bennett.

4. This Court has jurisdiction pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa]. 18 U.S.C. § 1964(c), 28 U.S.C. § 1331, 28 U.S.C. § 1332 and principles of pendent jurisdiction.

5. Defendant is a banking institution organized under the laws of the State of New York.

6. Defendant transacts and has transacted business in and resides and has its principal place of business in the Southern District of New York. The claims alleged herein arose in the Southern District of New York. Venue is proper in this District pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa], 18 U.S.C § 1965(a) and 28 U.S.C. § 1391.

FIRST CAUSE OF ACTION

7. Beginning in 1977 and continuing through 1982, defendant extended credit to and maintained credit for plaintiffs for the purpose of enabling plaintiffs to purchase and trade securities.

8. Defendant's extension of credit to and maintenance of credit for plaintiffs was in excess and in violation of the limits provided for in the Margin Rules.

9. Plaintiffs accepted the extension and maintenance of defendant's credit without knowledge that the extension and maintenance of credit was in excess and in violation of the limits provided for in the Margin Rules.

10. Defendant's extension and maintenance of credit in violation of the limits provided for in the Margin Rules caused plaintiffs losses in connection with plaintiffs' trading in securities in the amount of $2,000,000, due to (i) the decline in market value of the securities that plaintiffs purchased and

traded with the credit which defendant extended to and maintained for plaintiffs, and (ii) interest charged on the unlawful loans.

SECOND CAUSE OF ACTION

11. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10 above, with the same force and effect as if fully set forth at length herein.

12. Defendant knew or was reckless in its failure to know that the credit which it extended to and maintained for plaintiffs was in violation of the limits provided for in the Margin Rules.

13. Defendant's knowing or reckless violation of the Margin Rules, of which the plaintiffs were unaware, caused plaintiffs damages in the amount of $2,000,000.

THIRD CAUSE OF ACTION

14. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10 and 12-13 above, with the same force and effect as if fully set forth at length herein.

15. Before defendant extended credit to plaintiffs, defendant represented to plaintiffs that the Margin Rules were inapplicable to public utility stocks held as collateral security by banks. The plaintiffs told defendant, and the defendant therefore knew, that public utility stocks constituted the bulk of plaintiffs' portfolio of securities at the time the misrepresentations were made and the credit was extended. The plaintiffs also told defendant, and the defendant therefore knew, that the plaintiffs intended to continue to purchase, trade and maintain public utility stocks with the credit which defendant extended to and maintained for plaintiffs.

16. Defendant's representations alleged in paragraph 15 above were untrue when made.

17. The representations were material and plaintiffs relied upon them to their detriment.

18. If the representations had not been made plaintiffs would not have accepted defendant's credit, would not have purchased and traded securities with the credit and would not have suffered the losses alleged in paragraph 10 above.

19. Defendant's misrepresentations caused plaintiffs damages in the amount of $2,000,000.

FOURTH CAUSE OF ACTION

20. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10, 12-13 and 15-19 above, with the same force and effect as if fully set forth at length herein.

21. Defendant, in connection with the plaintiffs' purchase and sale of securities, by use of the mails and the means and instrumentalities of interstate commerce, made untrue statements of facts to plaintiffs and omitted to state facts to plaintiffs necessary to make the statements which the defendant made, in light of the circumstances under which they were made, not misleading, in that defendant (i) misrepresented to plaintiffs that the Margin Rules were inapplicable to public utility stocks held as collateral security by banks, and (ii) omitted to state to plaintiffs that defendant's extension of credit to and maintenance of credit for plaintiffs was in violation of the limits provided for in the Margin Rules.

22. The misrepresentations and omissions alleged in paragraph 21 were made with knowledge of their falsity or with reckless disregard for their truth.

23. Defendant's misrepresentations were material, and the defendant knew that plaintiffs would rely on them, which the plaintiffs did in fact do to their detriment.

24. Defendant's misrepresentations and omissions were made in connection with the purchase or sale of securities in that if defendant had not made the misrepresentations to

plaintiffs and had not omitted to state to plaintiffs that the credit was in violation of the Margin Rules, plaintiffs would not have accepted the credit, would not have purchased and traded securities with the credit and would not have suffered the losses alleged in paragraph 10 above.

25. Defendant's misrepresentations and omissions constitute violations of Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

26. Defendant's misrepresentations and omissions caused plaintiffs losses in the amount of $2,000,000.

FIFTH CAUSE OF ACTION

27. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10, 12-13, 15-19 and 21-26 above, with the same force and effect as if fully set forth at length herein.

28. Defendant defrauded plaintiffs by knowingly and intentionally making material misrepresentations to plaintiffs with an intent to induce plaintiffs' reliance on the misrepresentations and to defraud them, or by making the misrepresentations with a reckless disregard for their truth or falsity.

29. Defendant's fraud on plaintiffs caused plaintiffs damages in the amount of $2,000,000.

SIXTH CAUSE OF ACTION

30. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10, 12-13, 15-19, 21-26 and 28-29 above, with the same force and effect as if fully set forth at length herein.

31. Defendant, by making material misrepresentations to plaintiffs, induced or promoted the exchange, sale or purchase of securities within or from New York (i) by using or employing fraud, deception, concealment, suppression or false pretense, and (ii) by using or employing false representations or

statements which defendant knew to be false or which defendant would have ascertained or known to be false if defendant had made a reasonable effort to learn the truth.

32. Defendant violated the Martin Act, which caused plaintiffs damages in the amount of $2,000,000.

SEVENTH CAUSE OF ACTION

33. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10, 12-13, 15-19, 21-26, 28-29 and 31-32 above, with the same force and effect as if fully set forth at length herein.

34. Defendant engaged in fraud in the sale of securities (i) by knowingly extending credit to and maintaining credit for plaintiffs, on numerous separate occasions, for the purpose of purchasing and trading securities, in excess and in violation of the limits provided for in the Margin Rules, (ii) by misrepresenting to plaintiffs that the Margin Rules were inapplicable to public utility stocks held as collateral security by banks, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and (iii) by omitting to state to plaintiffs on numerous separate occasions that the extension and maintenance of credit violated the Margin Rules, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Each separate purchase or sale of securities which the plaintiffs made with the defendant's credit constituted a separate violation of Section 10(b) and Rule 10b-5 by the defendant.

35. Defendant thereby constituted an enterprise which engaged in and affected interstate commerce and which conducted its affairs through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1961-62.

36. Plaintiffs were injured in their business and property by reason of the unlawful pattern of racketeering activity alleged in paragraph 35, because the violations caused them to incur losses of $2,000,000 in connection with their acceptance of

unlawfully extended and maintained credit and their purchasing and trading of securities with the credit.

37. The violations alleged in paragraph 35 entitle plaintiffs to judgment, pursuant to 18 U.S.C. § 1964(c), for treble their damages of $2,000,000, together with costs and a reasonable attorney's fee.

EIGHTH CAUSE OF ACTION

38. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-10, 12-13, 15-19, 21-26, 28-29, 31-32 and 34-37 above, with the same force and effect as if fully set forth at length herein.

39. The violations of law alleged above constituted a scheme or artifice to defraud plaintiffs into accepting defendant's unlawful credit. Defendant used the mails for the purpose of executing the scheme or artifice to defraud, by sending confirmations, loan advices, letters and other documents from defendant's place of business in New York to plaintiffs at their home and business in New Jersey. Each such separate use of the mails constituted a separate violation of the federal mail fraud statute [18 U.S.C. § 1341].

40. Defendant thereby constituted an enterprise which engaged in and affected interstate commerce and which conducted its affairs through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1961-62.

41. Plaintiffs were injured in their business and property by reason of the unlawful pattern of racketeering activity alleged in paragraph 40, because the violations caused them to incur losses of $2,000,000 in connection with their acceptance of unlawfully extended and maintained credit and their purchasing and trading of securities with the credit.

42. The violations alleged in paragraph 40 entitle plaintiffs to judgment, pursuant to 18 U.S.C. § 1964(c), for treble their damages of $2,000,000, together with costs and reasonable attorneys' fees.

WHEREFORE, plaintiffs demand judgment for:

(1) $2,000,000 on the First Cause of Action;

(2) $2,000,000 on the Second Cause of Action;

(3) $2,000,000 on the Third Cause of Action;

(4) $2,000,000 on the Fourth Cause of Action;

(5) $2,000,000 on the Fifth Cause of Action;

(6) $2,000,000 on the Sixth Cause of Action;

(7) $6,000,000 plus costs and reasonable attorneys' fees on the Seventh Cause of Action; and

(8) $6,000,000 plus costs and reasonable attorneys' fees on the Eighth Cause of Action;

together with statutory interest, costs and disbursements, and with such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
April 27, 1984

SPENGLER CARLSON GUBAR
BRODSKY & FRISCHLING

By /s/ EDWARD BRODSKY
(A Member of the Firm)

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Bernard Cedarbaum, counsel of record for the respondent, hereby certify that three true and correct copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari were personally served this date on Edward Brodsky, counsel of record for the petitioners, by delivery thereof, at the office of said counsel at 280 Park Avenue, New York, New York, to an employee therein, in accordance with Rule 28.3 of the Rules of this Court, and I do hereby further certify in accordance with Rule 28.5 of the Rules of this Court that all parties required to be served have been served.

s/ BERNARD CEDARBAUM
Bernard Cedarbaum

New York, New York
December 2, 1985